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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 750

SALVATORE GRANELLO AND HYMAN LEVINE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A15) is reported at 365 F. 2d 990. The opinion of the district court denying a motion to suppress evidence (Pet. App. A16–A24) is reported at 243 F. Supp. 325, and its opinion denying a motion for new trial (Supp. R. 120a–125a) [1] is reported at 66–1 U.S.T.C. ¶ 9302.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1966 (Pet. App. A35–A36), and a peti-

[1] "R." refers to the stenographic transcript of the trial, and "Supp. R." to the government's appendix in the court of appeals.

tion for rehearing was denied on October 6, 1966 (Pet. App. A34). The petition for a writ of certiorari was filed on November 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether documents seized illegally from a third person may be introduced in evidence against a defendant whose rights were not violated by the seizure.

2. Whether the dismissal of the conspiracy counts at the first trial, in which the jury failed to agree on the substantive counts, barred the government at the retrial of the substantive counts from proving that petitioners had engaged in a joint venture.

3. Whether petitioner Granello should have been granted a severance prior to the retrial of the substantive counts.

4. Whether the trial court improperly limited petitioners' right to call a particular witness.

5. Whether petitioners were entitled to a new trial on the ground of newly discovered evidence.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

Rule 8. *Joinder of Offenses and of Defendants*

(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have

participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. *Relief from Prejudicial Joinder*

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

STATEMENT

On April 11, 1963, a five-count information was filed in the United States District Court for the Southern District of New York. The first four counts charged petitioners individually with wilful failures to file their respective income tax returns for the years 1956 and 1957 in violation of 26 U.S.C. 7203; and the fifth count charged them with conspiring to violate that section by failing to file returns (Supp. R. 1a–6a; Pet. 9).[2] On March 9, 1964, a three-count indictment was filed in the same court, the first two counts charging petitioners individually with wilful attempts to evade income taxes for 1957 by failing to file returns and pay taxes and by attempting to conceal their tax liability in violation of 26 U.S.C. 7201; and the third count charging them with conspiracy to defraud the

[2] Lowell Birrell was named as a co-conspirator, but not as a defendant.

United States by obstructing the collection of income taxes (Supp. R. 7a–10a; Pet. 9).

The two cases were consolidated for trial (Pet. App. A17). Before the case was submitted to the jury, both conspiracy counts were dismissed; the jury was unable to agree on the substantive counts (Pet. App. A17; Supp. R. 11a–15a). At the second trial each petitioner was convicted on the two substantive offenses charged in the information—wilful failure to file returns for 1956 and 1957—but the jury again was unable to agree on the substantive counts of the indictment (Pet. App. A3). Each petitioner was sentenced to consecutive terms of a year on each count and fined $2,000 (Pet. 5). The court of appeals unaninmously affirmed (Pet. App. A1–A15).

Petitioners do not challenge the sufficiency of the evidence that they wilfully failed to file income tax returns. This evidence, which is summarized in the opinion of the court of appeals (Pet. App. A3–A5) and in the trial court's charge to the jury (Supp. R. 55a–74a), showed that in 1955 petitioners, acting jointly, obtained 3,000,000 shares of stock in the Pacheco Petroleum Company at practically no cost; that they sold a large number of the shares during 1956 and 1957, principally to Lowell Birrell; that they received from such sales more than $225,000 in 1956 and $194,000 in 1957; that each petitioner's income tax on this long term capital gain was, roughly, $23,000 for 1956 and $18,000 for 1957; and that neither petitioner filed a return or paid any taxes, for either of those years (Supp. R. 95a–97a).

ARGUMENT

1. A large part of the government's evidence in this case consisted of documents that it had seized in 1959, pursuant to a search warrant, from the home and farm in Pennsylvania of an attorney with whom Lowell Birrell had deposited them. The documents apparently were either personal papers of Birrell or papers of corporations which he controlled or with which he was affiliated. (Pet. App. A18; *United States* v. *Birrell*, 242 F. Supp. 191, 195, 197, reargued and affirmed, 243 F. Supp. 36 (S.D.N.Y.).) Petitioners had sold to Birrell in 1956 and 1957 the major part of their stock in the Pacheco Petroleum Company; the sale of such stock generated the income that petitioners had not reported (see the Statement, *supra*, p. 5.) Birrell was not indicted in the present case, but was named as a co-conspirator in the conspiracy count of the information on which petitioners were convicted of the substantive counts. (The conspiracy count was dismissed at the close of the evidence in the first trial, in which the jury was unable to agree.) Although petitioners repeatedly state (Pet. 5, 6, 12, 13, 23, 27–28) that Birrell had represented them as an attorney, petitioners failed in their attempt to establish this claim (R. 753, 813–819).

Birrell was indicted in 1961 and 1962 (a year or more before the information was filed against petitioners) for various violations of the federal securities and mail fraud statutes—violations which were unrelated to the crimes of which petitioners were convicted. Birrell moved to suppress the documents

which the government had seized in 1959 and to have them returned, on the ground that they had been obtained through an unlawful search and seizure. The district court originally reserved decision on that motion but, shortly after petitioners had been convicted in the present case, it granted Birrell's motion to suppress.[3] The court first ruled that since it was "overwhelmingly established that the searches here in question were directed solely and exclusively against Birrell," who was "[t]he only person suggested in the papers [on the basis of which the warrants were issued] as having violated the law," Birrell was aggrieved by the search and seizure and therefore had standing to make the motion (242 F. Supp. at 198). It then held that the affidavits, on the basis of which the search warrants were obtained, were insufficient to establish probable cause, and that the search and seizure conducted pursuant thereto were illegal (p. 201).

Petitioners theretofore had unsuccessfully moved to suppress in their trial the evidence seized from Birrell (Pet. App. A17–A18). Following the suppression of such evidence in Birrell's case, the petitioners renewed their motion. The district court again denied the motion, ruling that petitioners had no standing to seek suppression of material taken from a third person (Pet. App. A16–A24), and the court of appeals affirmed (Pet. App. A11–A13).

[3] The district court withheld action, at that time, on Birrell's request for a return of the seized documents. After a further hearing, the court ordered return, but authorized the government to make and retain copies. *United States* v. *Birrell*, 243 F. Supp. 38, 41 (S.D. N.Y.).

These rulings are fully supported by this Court's recent decision in *Wong Sun* v. *United States*, 371 U.S. 471. In that case federal officers arrested James Wah Toy in his home for selling narcotics. They found no narcotics on the premises, but Toy stated that "Johnny" was selling narcotics. The agents went to Johnny Yee's house, where Yee produced narcotics and stated that he had obtained them from Wong Sun. Toy and Wong Sun were convicted of transporting and concealing narcotics. This Court held that probable cause did not exist for Toy's arrest, that Toy's statements made at the time of his arrest were therefore inadmissible against him, and that the narcotics taken from Yee also were inadmissible against Toy, since they were the product of the illegal arrest. The Court held, however, that the narcotics were admissible against Wong Sun. Noting that their exclusion as to Toy "was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee" (371 U.S. 492), the Court ruled (*ibid.*):

> The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial.

That decision had been foreshadowed in *Jones* v. *United States*, 362 U.S. 257, 261, where the Court stated that, "In order to qualify as a 'person aggrieved by an unlawful search and seizure'"—the touchstone under Rule 41(e) of the Federal Rules of Criminal

Procedure for standing to suppress evidence resulting therefrom

> one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

In the present case, as the district court held in granting Birrell's motion to suppress, the searches "were directed solely and exclusively against Birrell." The searches and seizures of Birrell's documents were made (1) in the course of investigating possible violations by Birrell of other laws than those that petitioners violated; (2) at the premises of Birrell's bailee who, as far as appears, had no connection at all with petitioners; thus they (3) "invaded no right of privacy of person or premises" (*Wong Sun, supra*) of the petitioners. *Wong Sun* also makes it clear that the fact that the petitioners had previous business dealings with Birrell did not give them standing to challenge the search and seizure of his documents. For although Johnny Yee had stated that he had obtained the narcotics from Wong Sun, this relationship did not "entitle Wong Sun to object to its use at his trial" (*ibid.*).[4]

[4] Contrary to petitioners' suggestion (Pet. 25–30), there is no conflict of decisions or confusion among the courts of appeals as to a person's lack of standing to suppress evidence obtained "as a consequence of a search or seizure directed at someone else" (*Jones, supra*), which "invaded no right of privacy of person or premises" (*Wong Sun, supra*) of his. In the following cases, all decided after *Wong Sun*, such persons were held not to have standing to challenge the search and seizure: *United*

2. Petitioners' contention (Pet. 30–34) that the dismissal of the conspiracy counts at the first trial barred the government from proving that they engaged in a joint venture in which they earned the unreported income, is without merit.

The trial court dismissed the conspiracy charge not because the government had failed to prove that petitioners had engaged in a joint venture, but because it had not proved that petitioners had agreed to violate the law by concealing each other's income (Supp. R. 12a–15a). As the court charged the jury, after reviewing the government's contention that the petitioners had participated in a joint enterprise for profit (Supp. R. 81a):

> You should note, however, that the government does not contend that there was a joint venture

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States v. *Bozza*, 365 F. 2d 206, 222–223 (C.A. 2); *United States* v. *Konigsberg*, 336 F. 2d 844, 846–847 (C.A. 3), certiorari denied, 379 U.S. 933; *Armada* v. *United States*, 319 F. 2d 793, 796 (C.A. 5), certiorari denied, 376 U.S. 906; *Staples* v. *United States*, 320 F. 2d 817, 820–821 (C.A. 5); *United States* v. *Haley*, 321 F. 2d 956, 959 (C.A. 6); *Fisher* v. *United States*, 324 F. 2d 775, 780 (C.A. 8); *Diaz-Rosendo* v. *United States*, 357 F. 2d 124, 130–134 (C.A. 9); *Murray* v. *United States*, 323 F. 2d 409, 411–413 (C.A. 10), certiorari denied, 383 U.S. 949; *Elbel* v. *United States*, 364 F. 2d 127, 136–138 (C.A. 10), certiorari denied, January 9, 1967, Misc. No. 705, this Term.

Rosencranz v. *United States*, 334 F. 2d 738 (C.A. 1) and *Schoeneman* v. *United States*, 317 F. 2d 173 (C.A.D.C.), upon which petitioners rely (Pet. 28–29), are clearly distinguishable. They held only that evidence directly obtained by a lawful search which had been suppressed against one defendant was also inadmissible against the other. In the present case, however, Birrell was not a co-defendant of petitioners; and although he was named as a co-conspirator in one count of the information, that count was dismissed during the first trial and was no longer in the case at the second trial, in which petitioners were convicted.

> to evade the income tax. The issues with respect to nonfiling of returns, wilfulness and the like are issues individual to each defendant on which he must be judged individually. * * *

Since the substantive counts charging failure to file returns involved no element of illegal agreement between petitioners, the dismissal of the conspiracy counts at the first trial determined no issue upon which petitioners' convictions at the second trial rested. *Yates* v. *United States,* 354 U.S. 298, 338.[5]

3. Petitioner Granello contends (Pet. 34–35) that, once the conspiracy counts had been dismissed at the first trial, "there were no longer any issues common to Levine and himself," and that he was "prejudiced as a matter of law" because he was denied a severance from Levine at the second trial. We submit, however, that the trial court did not abuse its discretion in denying the severance and that, in any event, as the court of appeals held (Pet. App. A10–A11), Granello was not prejudiced thereby.

Rule 8(b) of the Federal Rules of Criminal Procedure permits a joinder of defendants who "are alleged to have participated * * * in the same series of acts or transactions constituting an offense or offenses." Since the information and indictment initially charged a conspiracy, the original joinder of the two petitioners obviously was proper. Although at the second trial there was no longer any charge that

[5] There is accordingly no basis for petitioners' contention (Pet. 4, 33–34) that they were improperly denied the right to inform the jury at the second trial of the dismissal of the conspiracy counts at the first trial. *Yates* v. *United States,* *supra.*

the defendants had jointly committed a crime (the trial court having dismissed the conspiracy charges at the first trial), a large part of the proof of the offense of which they were convicted (failing to file a return) related to their joint participation in a business venture which generated the income they failed to report. Moreover, much of the evidence relating to the felony of concealing and attempting to conceal taxable income (on which the jury again was unable to agree at the second trial) similarly related to the defendants' joint participation in various acts.[6] Thus, as the court of appeals pointed out (Pet. App. A10), "[t]he evidence of joint action by the two defendants was sufficient to have permitted the Government to introduce at separate trials the same proof that it offered at the joint one."

The Advisory Committee's notes to the Federal Rules of Criminal Procedure indicate that Rule 8(b) was intended to permit the joinder of defendants in such circumstances. In commenting on the Second Preliminary Draft of the Rules—in which the language of Rule 8(b) was the same as it now is—the Committee stated: "Defendants may be charged in the same indictment if they are charged with offenses which

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[6] For example, Birrell's payments to petitioners were made at various locations in New York City by a messenger who, at Birrell's instructions, often paid them simultaneously in cash (R. 1219–1222, 1223–1225, 1337–1339, 1391–1393). The trial court pointed out to the jury that an intent to conceal income could be inferred in part from the avoidance of records usually employed in similar business transactions (Supp. R. 73a).

are based on the same series of acts or transactions."[7] The substantive offenses for which petitioners were tried were "based on" the same series of transactions, *i.e.*, the joint activities which generated the income they failed to report. In the circumstances, the trial court did not abuse its discretion in denying Granello's motion for a severance of the second trial.

In any event, as the court of appeals stated (Pet. App. A10–A11), "[t]he jury here was carefully instructed that the issues as to each defendant must be determined separately. * * * Here, where the Government could have proven the receipt of income by both on the trial of either and the jury was appropriately instructed, no prejudice from the joinder could have occurred." Cf. Rule 14 of the Federal Rules of Criminal Procedure, which provides that "[i]f it appears that a defendant * * * is prejudiced by a * * * joinder [of defendants] for trial together, the court may * * * grant a severance of defendants or provide whatever other relief justice requires."

4. There is no merit to petitioners' contention (Pet. 36–40) that they were denied the right to call Lowell Birrell as a witness. In the first trial, Birrell was called as a defense witness, but refused to answer any questions on the ground of self-incrimination

[7] Federal Rules of Criminal Procedure, Second Preliminary Draft (Government Printing Office, 1944) p. 37; cf. p. 29 with Rule 8(b), *supra*, p. 3. See the following cases, which the Advisory Committee cited, upholding the joinder of defendants in comparable situations: *United States* v. *Tuffanelli*, 131 F. 2d 890, 893–894 (C.A. 7); *Morgan* v. *United States*, 98 F. 2d 473 (C.A. 8), certiorari denied, 305 U.S. 648; *Todd* v. *United States*, 48 F. 2d 530, 532 (C.A. 5); *Davis* v. *United States*, 12 F. 2d 253 (C.A. 5), certiorari denied *sub. nom. Land* v. *United States*, 271 U.S. 688.

(Supp. R. 19a–20a, 38a). In the second trial, Birrell was sworn on *voir dire* as a government witness out of the presence of the jury, and stated he would again claim the privilege no matter which side called him (Supp. R. 28a–31a). The trial court noted that this precluded the government from calling him as a witness, but stated that the defense would be given further opportunity to examine Birrell on *voir dire* and to produce him before the jury without regard to his answers on *voir dire* (Supp. R. 33a). The court stated that if Birrell were called by the defense and answered questions, the court would advise the jury that the government had been precluded from calling him (Supp. R. 35a). Petitioners did not further examine Birrell on *voir dire,* or call him as a witness, although he was available (Supp. R. 32a).

The trial court's announcement that, if Birrell testified for the defense, it would inform the jury that he had refused to testify for the government, was wholly proper. If Birrell had so testified, the government could have brought out on cross-examination that he had refused to testify for the prosecution, to prevent the jury from drawing an adverse inference from its failure to produce a material witness. *United States* v. *Gernie,* 252 F. 2d 664, 669 (C.A. 2), certiorari denied, 356 U.S. 968; *United States* v. *Sing Kee,* 250 F. 2d 236 (C.A. 2), certiorari denied, 355 U.S. 954. The trial court's proposed comment would have accomplished the same objective, and would have been an appropriate comment on the evidence. Thus, as the court of appeals correctly ruled (Pet. App. A13), the trial court's action

> in no way deprived the defendants of their right to call Birrell; it deprived them only of power to make or suggest an unfair argument if they did. * * *

5. Finally, there is no substance to the contention (Pet. 41–42) that a new trial should have been granted on the grounds of newly discovered evidence. Petitioners claimed at the trial that Birrell had paid them for Pacheco's *assets* rather than for its *stock;* that they had simply acted as agents for Pacheco in receiving the money; and that they had not themselves received any taxable income. The newly discovered evidence was a copy of the minutes of a meeting of the board of directors of one of Birrell's corporations, at which purchase of Pacheco's *assets* was authorized (Supp. R. 115a–119a)—a document which, petitioners contended, supported their position at the trial.[8]

Both the district court (Supp. R. 121a–123a) and the court of appeals (Pet. App. A13–A15) correctly concluded that there was little likelihood that this evidence would have had any effect upon the jury's verdict. Both courts noted that the payments referred to in the minutes were quite different from Birrell's payments to petitioners; that the "agency" theory had been presented to, and rejected by, the jury; and that the minutes did not explain either Birrell's acquisition of 2,000,000 shares of Pacheco

[8] Petitioners' counsel obtained the document from Birrell about six months after the trial. However, Birrell's letter forwarding the copy did not answer counsel's question whether Birrell had purchased Pacheco stock from petitioners. (Cf. Supp. R. 111a–112a with 113a–114a.)

stock or petitioners' personal use of more than $400,000 received therefor. Moreover, this "newly discovered" evidence was of such character that petitioners must have been aware that some such record existed; yet they neither sought its production during the trial nor offered any convincing explanation for their delay in coming forward with it (Supp. R. 32a–38a). The basis for the motion was clearly insufficient to meet the strict test of newly discovered evidence.

Pursuant to the policy set forth in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, this Term, 385 U.S. 372, we have conducted a review to determine whether any electronic eavesdropping or wiretapping affected the conviction of either of the petitioners. It appears from this inquiry that no conversations of petitioner Granello were overheard by any electronic surveillance; he was never the direct subject of an electronic surveillance nor did he engage in conversations held on other premises which were subject to such surveillance.[9] As for petitioner Levine, we have discovered that pursuant to the Departmental authorization described at pages 2–3 of the Supplemental Memorandum for the United States in *Black* v. *United States*, 385 U.S. 26 (No. 1029, O.T. 1965), the Federal Bureau of Investigation, on or about May 11, 1962, installed a micro-

[9] Since no rights of petitioner Granello were invaded, we submit that irrespective of this Court's disposition of Levine's conviction Granello's should stand. See *Wong Sun* v. *United States*, 371 U.S. 471, 491–492, and the discussion at pp. 8–11, *supra*, and authorities there cited.

phone by trespass in a commercial establishment in Florida owned by an acquaintance of petitioner Levine and in which Levine may have had a proprietary interest. During this surveillance, which covered the period from May 11, 1962 to May 7, 1963, Levine was on the premises and conversations bebetween him and others were overheard.

Logs reflecting the content of these conversations are available. They show that none of the conversations related in any manner to this case, which was initiated by information in New York in April 1963, or to the years here involved (1956 and 1957). Neither the existence of the surveillance nor any information overheard was communicated in any manner to the Internal Revenue Service or to government counsel who prosecuted this case. Nor was any conversation between Levine and his attorneys in this case—who were New York counsel—overheard during the Florida surveillance. During the period of the surveillance, however, Levine was tried and convicted (under the name of George Levine) in the United States District Court for the Southern District of Florida in two other federal criminal trials which are unrelated to the present case. Certain of the conversations overheard related to those cases and were with attorneys who there represented petitioner,[10] but it

[10] In one of those cases he was convicted in December 1962 of transporting counterfeit bonds, and is presently serving a ten-year sentence of imprisonment therefor. *Rogers* v. *United States*, 334 F. 2d 83 (C.A. 5), certiorari denied, 380 U.S. 915. In the other case he was convicted in July 1962 of violating the anti-fraud provisions of the Securities Act of 1933 and the mail fraud statute. *Gradsky* v. *United States*, 342 F. 2d 147

does not appear that any of the material in the logs was communicated to the attorneys trying either of the cases or to the Securities and Exchange Commission. We are filing memoranda in the courts which presently have jurisdiction over those cases advising them of these facts and suggesting the appropriate dispositions.

We firmly believe, however, that the present case is governed by different considerations and that the relief provided in *Black* v. *United States,* 385 U.S. 26; *Schipani* v. *United States,* 385 U.S. 372; and *O'Brien* v. *United States,* No. 823, this Term, decided March 20, 1967, is wholly inappropriate here. In *Schipani* we advised this Court that information obtained by electronic monitoring had "provided investigatory leads and other information used in proceeding against petitioner." That is not true of this case. Both *Black* and *O'Brien* concerned surveillances in the course of which conversations between an indicted defendant and his counsel in that proceeding were overheard. This Court noted in its *Black* opinion that the issue presented was similar to the question in *Davis* v. *United States,* No. 245, this Term, certiorari denied, 385 U.S. 927, which involved a claim that attorney-client conferences were surreptitiously overheard, and it held that the most appropriate means of removing any doubt as to the fairness of petitioner's trial was to vacate the conviction and allow the questions to be fully litigated at a new trial.

(C.A. 5), vacated and remanded *sub nom. Levine* v. *United States,* 383 U.S. 265. The latter case is now pending on the remand before the court of appeals.

Substantially different considerations control, we submit, when there is no overhearing of attorney-client conversations and when the Sixth Amendment is not involved at all.[11] In those circumstances, a post-conviction discovery of impermissible monitoring should be treated no differently than any other discovery at that juncture of an unlawful search or other conduct infringing upon the accused's Fourth Amendment rights. It is entirely clear, we submit, that if it had recently been learned, for example, that an apartment in which petitioner resided in Florida had been unlawfully searched without his knowledge and in his absence, the present conviction for failing to file an income-tax return would not be affected by that search unless evidence introduced at the trial had been obtained by the search or through leads which had thereby been discovered. If, as is true here, the impermissible search produced nothing that was even remotely relevant to the tax charge, the conviction would stand.[12]

This Court has held directly or impliedly time and again—as recently as *Hoffa* v. *United States*, 385 U.S. 293; *United States* v. *Blue*, 384 U.S. 251; and *Wong Sun* v. *United States*, 371 U.S. 471—that if,

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[11] It is true that conversations between petitioner and attorneys were overheard, but the attorneys whom petitioner was then consulting did not advise or represent him in this litigation. Insofar as this case is concerned, therefore, there was no intrusion upon attorney-client confidences.

[12] Indeed, the government believes that its duty to disclose turns on whether something that is arguably material has been discovered. Here, such information as is arguably material relates to the two other cases involving petitioner.

in the gathering of evidence, the government violates an accused's constitutional rights, the appropriate remedy is the suppression of that evidence and its fruits, not the reversal of an untainted conviction or any other indirect sanction such as dismissal of an indictment. The decisions in the *Black* and *O'Brien* cases carve out an exception to that general rule for instances in which the government discloses, on review of a conviction, that an accused's consultation with his attorney regarding the charge on which he was convicted was monitored. It would be a serious and far-reaching extension of that proposition if this Court were to apply any rule similar to *Black* and *O'Brien* in an instance where no Sixth Amendment right is involved, where the evidence introduced at trial was not tainted by any monitoring, and where the information obtained as a result of overhearing one or more conversations of the accused was of no relevance whatever to the charge which produced the conviction under review.

Having reviewed the logs of this electronic surveillance, we are able to represent to this Court that there was no conversation overheard which was remotely relevant to this case. Petitioner's counsel will have a full opportunity to examine these logs, under an appropriate protective order,[13] as a consequence of

[13] In other cases in which disclosures of electronic surveillance have been made to courts of appeals and the logs have contained conversations which might reflect adversely on innocent parties, we have requested and obtained orders insuring that no publication of the contents of the logs would be made. We would seek the same kind of order here.

our action in the courts below respecting his other convictions. This, we believe, will confirm the proposition that there is nothing in them relevant to the instant case. If petitioner should be of any other view, he may, of course, seek a remedy in the district court.

We urge, therefore, that this Court act upon the present petition for certiorari on the basis of the record made below, and, on those grounds, deny the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

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